UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiff,

v. 12 Civ. 7412 (WHP)

UNITED STATES DEPARTMENT OF JUSTICE,

Conference

Defendant.

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New York, N.Y.
August 15, 2013
3:00 p.m.

Before:

HON. WILLIAM H. PAULEY III

District Judge

APPEARANCES

American civil liberties union foundation
Attorneys for Plaintiff
BY: CATHERINE N. CRUMP
BRIAN HAUSS

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for Defendant
CARINA H. SCHOENBERGER
Assistant United States Attorney

(Case called)

THE CLERK: Appearances for the plaintiff?

MR. HAUSS: Good afternoon, your Honor. My name is Brian Hauss. I'm joined by my colleague Katherine Crump.

THE COURT: Good afternoon.

THE CLERK: For the defendants?

MS. SCHOENBERGER: Good afternoon, your Honor. Assistant United States Attorney Carina Schoenberg on behalf of the defendant, the U.S. Department of Justice.

THE COURT: Good afternoon, Ms. Schoenberger.

This is oral argument on the parties' respective motions for summary judgment. Mr. Hauss, do you wish to be heard?

MR. HAUSS: Yes, your Honor.

THE COURT: Why don't you take the podium.

MR. HAUSS: In the wake of the Supreme Court's landmark Fourth Amendment decision in United States v. Jones, the justice department authored two memoranda regarding the government's use of location tracking technologies. The ACLU filed a FOIA request for these documents because the FBI's general counsel, Mr. Andrew Weissmann, publicly characterized them as guidance to the field about when they can use GPS going forward, what kinds of arguments they can make if there are challenges, and what Jones means for other types of location-tracking techniques beyond GPS.

The government now asserts that the documents are devoted almost exclusively to discussions of litigation strategy. But given the discrepancy between Mr. Weissmann's public remarks and the government's declarations, we believe that in camera review is warranted so that the Court may determine for itself whether or not these documents must be disclosed.

The government argues that the documents are protected under exemption 5 and exemption 7(E), but it has failed to demonstrate that either exemption applies.

First, with respect to exemption 5, the work product doctrine was meant to protect an attorney's thoughts and other information related to litigation. It was never meant to protect agencywide guidance regarding government law enforcement policies.

THE COURT: On that note, the memos were certainly written with an eye toward litigation but without discussion of specific claims, I take it because litigation involving the Department of Justice is so widespread among 94 judicial districts. If you accept that fact, should the government be deprived of the work product privilege because such high-level documents are necessarily general?

MR. HAUSS: Under our reading of the D.C. Circuit's opinions in Coastal States, SafeCard, and In Re Sealed Cases, law enforcement documents drafted outside the context of a

particular anticipated or ongoing litigation do not enjoy work product protection.

But even if the Court disagrees with that conclusion, I think the core holding of Coastal States, and this was also recognized in Delaney, is that objective, neutral analysis of agency law or governing regulations, such as one might find in an agency manual or question-and-answer document, are not protected work product.

The D.C. Circuit made clear in Judicial Watch that only those parts of a document that are work product may be withheld pursuant to exemption 5's work product protection. If the Court concludes that these documents do contain some protected discussion of the government's litigation strategy, arguments that prosecutors might raise in suppression hearings, it could still hold, and we think it should hold, that guidance to investigators about when they can use GPS or other location tracking techniques would still have to be disclosed.

THE COURT: Does it matter that in Coastal States the memos were fleshing out laws that the DOE was charged with enforcing, whereas the memos here simply are discussing laws that govern's DOJ's law enforcement activities.

MR. HAUSS: We don't think that distinction makes a difference when it comes to work product protections. DOJ is charged with implementing the government's investigative policies. Insofar as it does that, the way it implements those

policies will affect the privacy rights of Americans. We believe that to the extent that DOJ has working law on how it is going to implement its Fourth Amendment obligations, the public is entitled to that sort of information.

I would like to turn for a moment to the exemption 7(E) issue. We believe that the government has simply failed to carry what is actually a quite heavy burden when it argues that everything in these memoranda discussing GPS and possibly other well-known location tracking techniques, such as cell phone tracking or license plate readers, is nonpublic. GPS is something that is litigated regularly in district courts and suppression hearings throughout the country. It is the subject of widespread media commentary. It is regularly discussed on TV and in the press.

When the government says that everything in these documents is in fact nonpublic, we think it has to provide more specificity than it has here. In that regard we also feel that in camera review is warranted so that the Court may determine whether or not the government has overredacted these documents.

I would like to get at what I think the heart is for our request for in camera review here. There are two disputes about these documents. The first dispute is what is in the documents and whether or not they contain guidance to investigators about what they can do.

We believe based on Mr. Weissmann's remarks that they

contain this sort of information. In fact, given that Mr. Weissmann is the general counsel of the Federal Bureau of Investigation, we think that goes to show that the documents were meant for investigators and not just for government prosecutors to use in their litigation.

Additionally, the fact that Mr. Weissmann said that the documents instruct officials about when they can use GPS goes to show that they establish clear guidelines for agency personnel to follow. As the Second Circuit held in Brennan Center, it is precisely those sorts of clear guidelines that are agency working law and that must be disclosed.

THE COURT: Is there any support for the agency law exception to 7(E)?

MR. HAUSS: We think there is some support for that, your Honor. In PHE the court suggested that the search and seizure digest in DOJ's obscenity manual was precisely the sort of document that FOIA would ordinarily require to be disclosed. Then they cited a working law case. But even if the working law exception doesn't apply in the 7(E) context, we still believe there is plenty of public information that the government would be obligated to disclose simply because it is already in the public domain.

The government argues that releasing this information would create a circumvention risk. With regards to certain kinds of information, say, where the government agents can put

a GPS tracker on a suspect's car or what streets to install closed circuit TV cameras on, we could see that that is precisely the sort of information that 7(E) was designed to protect and when it should be withheld.

To the extent that the documents tell agents when they need a warrant to use GPS, it is hard to imagine how a criminal's knowledge of a warrant requirement would substantially aid their ability to evade law enforcement. I don't imagine criminals go around wondering if the Department of Justice has established probable cause as opposed to reasonable suspicion.

THE COURT: How do matters like that constitute agency law if ultimately they have to be decided by courts?

MR. HAUSS: To the extent that the matters will ultimately come up before the courts, it might not be agency working law. I believe this is what the Supreme Court was suggesting in Sears. But the Supreme Court was very careful to limit Sears insofar as it said that it was only because the general counsel to the agency must become a party to the litigation with respect to which he had made that decision, that that was the only reason that the working law exception didn't really apply there.

In that same case they held that decisions not to advance litigation before the board would have to be disclosed because they are working law. Although many of the issues

raised in those memoranda --

THE COURT: Because that's the final decision. In essence, when the agency decides they are not going to take action in court, that is the end of it. But how is that analogous to what is presented here?

MR. HAUSS: I think it is analogous, your Honor, to the extent that if DOJ says we are not going to do this particular type of location tracking, that is an issue that will then never appear before any court. There are certain kinds of instructions that might be in these documents that will simply never arise in litigation.

THE COURT: On that particular point, doesn't the government say that that's where circumvention really comes in, that it is very important that the public not know what the government has decided not to do, because those with an evil intent will take advantage of that synapse, if you will.

MR. HAUSS: Yes, your Honor. In those circumstances the court would have to apply 7(E) analysis. The first step of that analysis would be to determine whether or not the information was already public. Hypothetically, if there was something in that document that said we will no longer do this type of tracking and the public already knew about it, then it would have to be disclosed. If they said we won't do this type of tracking and the public did not know about it and they create a circumvention risk, then the government would be

justified in withholding that information.

THE COURT: I hope I'm not butchering the name, but is it Soghoian?

MR. HAUSS: Soghoian.

THE COURT: I am butchering it. Is the Soghoian case distinguishable or was it wrongly decided?

MR. HAUSS: We would argue primarily that the Soghoian case was wrongly decided, your Honor. That case was litigated pro se. For one thing, the district court opinion in that case did not really grapple with the D.C. Circuit decisions in Coastal States, SafeCard, and In Re Sealed Cases and how they affected the analysis there.

But I would also suggest that it is possible that Soghoian is distinguishable. It is hard to know without knowing exactly what was in those documents. The court there suggested that the documents really were involved with questions of litigation strategy. Perhaps it is possible in some sense that investigative strategy, to the extent that it really is strategy, could be protected under that umbrella.

What is unclear from Soghoian is whether or not those documents contained clear policy guidance to the officials: Don't do X unless Y and Z circumstances apply, say. In those circumstances I think there is a fair basis for distinguishing Soghoian.

THE COURT: In view of Delaney and In Re Sealed Cases,

what is left of Coastal States?

MR. HAUSS: In our reading of In Re Sealed Cases, the Coastal States particular case requirement applies when the government acts in the law enforcement context. When DOJ is preparing documents, it has to connect those documents to a particular anticipated or ongoing prosecution. Delaney and Schiller, I believe was the other case, were both civil cases. In those contexts the government was really concerned about defending policies in litigation that other people might bring before it.

I think that when the government acts as a sovereign, its interest in protecting its documents is more circumscribed. The D.C. Circuit admonished in Senate of Commonwealth of Puerto Rico that it is important for the courts to construe the work product privilege carefully in the law enforcement context because everything the prosecutor does on some level is connected with litigation. If the work product rules are allowed to expand beyond their proper bounds, then ultimately nothing will be disclosed.

THE COURT: Here isn't the government, in essence, attempting to defend against claims of Fourth Amendment violations?

MR. HAUSS: Yes. I still think that their interests are lesser simply because they are acting in a law enforcement context. But even to the extent that the court wishes to

protect the government's litigation strategy about how it defends these inevitable suppression hearings that will come up, I think the Court could still draw a rule that protects that sort of information while still requiring disclosure of actual guidance to investigators about what they have to do when they install or use these sorts of location tracking technologies. I think that is really what was at the heart of the Coastal States, was that the idea of neutral objective analysis is not the sort of thing that the work product doctrine was meant to protect.

THE COURT: Anything further at this time?

MR. HAUSS: No, your Honor. Thank you very much.

THE COURT: Thank you, Mr. Hauss.

Ms. Schoenberger.

MS. SCHOENBERGER: The two documents that the ACLU is requesting in this case are core attorney work product, and they reference specific investigative techniques used by the Department of Justice. DOJ appropriately redacted them pursuant to exemptions 5 and 7(E), and the declarations that the government has submitted provide a sufficient basis for the Court to grant summary judgment in favor of the government.

With respect to exemption 5, the declarations make clear that these documents are the essential type of attorney work product contemplated by Rule 26. They include the mental impressions of DOJ attorneys, their opinions and theories about

the Supreme Court's decision in the Jones case.

The declarations describe that these documents were authored specifically to serve as litigation aids for prosecutors, that they talked about potential arguments that may arise in evidence hearings, and that they assess the strengths and weaknesses of alternative positions that litigators may take. They also expressed that every prosecutor needs to make a case-by-case determination about which strategies are appropriate to use in a specific case.

THE COURT: For work product privilege, does it matter that the lawyers who drafted the memos are discussing legal strategies in prosecutions and not how to defend agencies from affirmative litigation?

MS. SCHOENBERGER: There is no basis to make that distinction, your Honor. There is no legal tether to hold that there should be a different rule in the criminal context than in the civil context. The ACLU places great weight on the Coastal States case by saying that they were neutral, balanced agency interpretations of policies, but that is simply not what we have here. Moreover, the Coastal States case did not create a blanket rule saying that prosecutors have a more circumscribed availability to the attorney work product privilege.

THE COURT: What about the ACLU's argument that these documents receive lesser protection in the law enforcement

arena?

MS. SCHOENBERGER: There should be no lesser protection. These are the types of documents that should be encouraged. Attorney work product is a doctrine or a privilege that is designed to provide a zone of privacy for lawyers to tease out legal strategies. When the Supreme Court comes out with an opinion that leaves open a number of questions, we should want our federal prosecutors to be able to explore the implications of a new ruling from the Supreme Court.

THE COURT: Does In Re Sealed Cases draw a line between prosecutors on the one hand who need to be addressing a specific claim and legal advisers protecting government agencies from civil suits on the other?

MS. SCHOENBERGER: What In Re Sealed Cases does is specify that in Coastal States there are two different types of documents, the neutral analyses that were at issue there and then types that look at specific claims of wrongdoing. It does not set forth a rule saying that prosecutors always have to have a specific claim in mind or even that civil litigants who are not defending a case but rather bringing one need to have a specific claim in mind.

The Schiller case out of the D.C. Circuit is instructive. In that case it was lawyers from the National Labor Relations Board, and the documents at issue were guidance and tips about how to build a case under a specific labor

statute. It talked about building defenses but also about how to handle and bring those types of cases. That was a case that came after Coastal States, did not require a specific claim, and it did not make a distinction between whether the lawyer was bringing the case or defending against one or simply serving as a legal adviser.

THE COURT: Has the D.C. Circuit overruled the specific claim language in Coastal States?

MS. SCHOENBERGER: It has not overruled it. It has left over the question of whether or not it has continued vitality in the context of government prosecutors.

THE COURT: If the work product privilege applies, does that mean that the entire document is protected?

MS. SCHOENBERGER: Yes, your Honor. In this case the DOJ made a discretionary release of certain information contained in the document. But under FOIA it did not have an obligation to segregate out factual from legal analysis, because the attorney work product privilege applies to the document in its entirety.

THE COURT: Could there be segregable portions that are not privileged?

MS. SCHOENBERGER: In this case both documents are core attorney work product in their entirety, and there is no portion that would be segregated out from that. The portions that were segregated out were those that were not covered also

by exemption 7(E).

Also, I point the Court's attention back to the Soghoian case. That was a case decided just last year, long after the Coastal States decision came out. The ACLU posits that the court there did not grapple with Coastal States. That's because it doesn't need to. It was clear under the authority of Schiller and Delaney that the types of document there, which are very similar to the types of documents here, were protected by the attorney work product.

THE COURT: Sometimes a pro se case is not necessarily at the zenith of the adversarial process, is it?

MS. SCHOENBERGER: That may be true, your Honor. But the rules of FOIA and the obligations on the government don't change just because one party is not represented. Moreover, I would point out that the opinion specifies that the pro se plaintiff in that case was a Ph.D candidate, so by no means an unsophisticated party.

THE COURT: Not a lawyer, though, right?

MS. SCHOENBERGER: Not a lawyer, at least as identified in the case.

THE COURT: If the memos at issue here articulate guidelines for law enforcement to follow, why don't they constitute DOJ's working law with respect to location tracking?

MS. SCHOENBERGER: As an initial matter, the government would not concede that there is a working law

exception to the attorney work product privilege under exemption 5. That doctrine has arisen mainly in the context of predecisional documents that are protected by the deliberative process. Under the Supreme Court's precedent, there is a distinction made between the types of relationships between a predecisional document that becomes policy and other types of privileges that might be covered by exemption 5.

It is also a different matter here because, as the Court has already pointed out, ultimately decisions about the constitutionality of the department's actions will be determined by the Court. Even if these documents provide directives to prosecutors, which they do not, they could still be covered by the attorney work product because they would not be ultimate decisions being rendered by the agency to the public, but rather they would establish positions to be taken in court and ultimately determined by a judge.

THE COURT: What about to the extent they offer guidance about what actions not to take to law enforcement personnel, sort of akin to the decision in Sears not to file an NLRB complaint?

MS. SCHOENBERGER: The documents do not provide any directives to prosecutors about what they can or cannot do. Furthermore, I think the ACLU overstates what the field in this case is. As you can see on the face of the documents, they are directed to federal prosecutors. They are guidance for

litigating cases and conducting investigations from the lawyer's perspective. These are not memos that are distributed to FBI agents about what they can and cannot do.

The ACLU puts great weight on the comments that were made by the general counsel of the FBI at a law review symposium event. These were not formal remarks. Mr. Weissmann was responding casually to an audience question. The context of his remarks indicates that these are documents that were prepared in anticipation of litigation to address questions that might arise and considering the litigation risk that the Jones decision might create.

His remarks were also made before the memos were finalized or distributed. He didn't reveal any of the contents of the documents. And while the ACLU seems to interpret his remarks as indicating that they provide policies, interpretations of Fourth Amendment obligations, or directions to FBI agents, they do not, and the declarations that the government has submitted have made that clear.

THE COURT: Why shouldn't this Court review the two memoranda in camera?

MS. SCHOENBERGER: FOIA provides for in camera review and the Court is able to within its discretion. The government respectfully submits that that is not necessary in this case because of the declarations that have been submitted. They are sufficiently detailed to allow the Court to make an assessment

that the redactions that were made were appropriate. The Court is, of course, able to review the documents in camera, but it is the government's burden to show that the redactions were appropriate through their declarations, and here the government has met that burden.

THE COURT: For example, with respect to the government's invocation of 7(E), how can the Court determine whether the information in the memo is publicly known without an in camera review?

MS. SCHOENBERGER: The declarations specify that while there are aspects of the techniques that are publicly known, for example, GPS tracking is something that is known publicly, there are details about the way that those investigative techniques are employed that are not publicly known, including where and when and how and with which entities the department works to employee the different techniques.

If the Court decides that these documents are properly protected by the attorney work product, it doesn't need to reach the question of whether 7(E) was also properly asserted. But the declarations that are submitted by the government are afforded the presumption of good faith. The ACLU has not rebutted that presumption. And the judge may use the declarations alone to make a decision about this case.

THE COURT: In PHE, the D.C. Circuit said that the discussion of search and seizure law was precisely the type of

information that was appropriate for release under FOIA. How is the situation here different?

MS. SCHOENBERGER: I would note that the Court in PHE didn't make any holding about that or actually order that any information would have to be revealed. It just commented that that information was like other information that would have to be produced under the working law doctrine.

To the extent the court there was suggesting that there is a working law exception to exemption 7(E), the government disagrees with that position. Indeed, this Court has addressed a very similar question in The New York Times case in considering whether the working law doctrine might apply to exemption 1, which covers classified information.

There are certain types of documents that regardless of whether they may be subject to disclosure under the section (a)(2) of the Freedom of Information Act, are nevertheless protected because of the concerns that are addressed in the exemptions. Classified information is an example of that. There could be something that is a clear agency policy but is still classified information that the government is entitled to keep from public disclosure because of the safety concerns that it could raise.

7(E) information is very similar. So even if these documents were directives, if they presented and disclosed the types of law enforcement techniques that are not publicly known

or that would reasonably lead to circumvention of the law, then they are entitled to protection regardless of whether they are working law.

Here these documents are not working law, and the reasons for that are detailed in the government's declaration. But even if they were, they could still be protected by 7(E), and the working law exception would not apply.

THE COURT: Anything further?

MS. SCHOENBERGER: No, your Honor.

THE COURT: Thank you, Ms. Schoenberger.

Do you wish to be heard further, Mr. Hauss?

MR. HAUSS: Yes, your Honor. Thank you. I'd like to make just a few quick points, your Honor.

First, with respect to the working law exception and how it is applied to the work product doctrine, we believe that the Second Circuit's decision in Brennan Center makes clear that when a document constitutes working law, it then falls outside the scope of exemption 5, and that applies whether or not the particular privilege asserted for exemption 5 is deliberative process, work product, or attorney-client privilege.

Second, with respect to segregability in particular, the D.C. Circuit's decision in Judicial Watch held that it does not make sense to employ FOIA segregability to determine which parts of a document are segregable and which are deliberative

when the government is claiming work product protection. That makes sense because work product protects both factual and deliberative material.

The court was also clear that it was relying on the district court's finding that the documents were not partially work product, in other words, that the documents included the kinds of information protected by the work product doctrine. It would be unfair, for example, if the Department of Justice were able to sneak some nonwork product information into an otherwise work product protected document and thereby immunize it from FOIA review.

Finally, with respect to the importance for in camera review in this case, we concede that it is possible that Mr. Weissmann mischaracterized these documents when he spoke at the University of the San Francisco Law Review Symposium. But I think his comments at least raise a strong doubt as to exactly what is in these memos.

When he talked about them, not only did he say that they tell law enforcement officials when they can use these techniques going forward, he also said that they answer questions such as does Jones apply with respect to boats, does it apply with respect to planes, does it apply at the border. In other words, he suggests that the memos contain precisely the sorts of information that would constitute agency working law and that seem far removed from litigation strategy

discussions but rather much closer to manual-like policy decisions from the top of the Department of Justice. That's why we think in camera review is particularly important with respect to the exemption 5 issue.

With respect to the exemption 7(E) issue, again, we think that in camera review is necessary here simply because it is impossible to know if the government has gotten over-enthusiastic with the redaction pen. GPS is such a commonly known technique that it is hard to believe that everything in a 55-page document concerning GPS is either nonpublic or so closely bound up with nonpublic information that it cannot be disclosed.

Similarly with respect to the memorandum concerning additional investigative techniques, it is possible that memorandum deals with cell phone tracking, license place readers. If it does, I think the burden is on the government to tell us it involves those kinds of techniques and then explain why information related to those techniques is nonpublic and would create a circumvention risk.

Finally, we think that in camera review is particularly important here because the country is currently engaged in an important public debate about the proper extent of government surveillance activities. These documents have an important role to play in informing that debate. We therefore think that extra care should be taken to make sure that they

are not inappropriately withheld from the public.

THE COURT: Thank you, Mr. Hauss.

MR. HAUSS: Thank you, your Honor.

THE COURT: Anything further, Ms. Schoenberger?

MS. SCHOENBERGER: If I can briefly respond, your Honor?

THE COURT: Surely.

MS. SCHOENBERGER: With respect to the Brennan Center decision, that decision dealt just with the deliberative process and the attorney-client privilege and did not reach whether or not the working law doctrine would apply to attorney work product. The Sears case, however, does refer directly to attorney work product, and that is a decision that came from the Supreme Court. There the court said that the documents at issue were entitled to attorney work product privilege regardless of whether or not they were the type of staff instructions that would be subject to disclosure under section (a)(2) of FOIA.

Further, in another Supreme Court case, which is not cited in the government's briefs but is the Federal Open Market Committee v. Merrill, the cite there is 443 U.S. 340, the Supreme Court said that there is a distinction between the type of relationship of a predecisional document and a document that loses predecisional status because it becomes policy. It says that that does not necessarily apply to the other types of

privileges under exemption 5. Another type of privilege that that would cover is the attorney work product privilege for the reasons that I described a little bit earlier.

With respect to Mr. Weissmann's remarks, again, I believe that they are being overread by the ACLU. They have interpreted his remarks to say one thing. Indeed, they are not inconsistent with what is in the government's declarations. It is simply that they need to be interpreted in light of the declarations to understand what it is that he was talking about. Again, he says that they are guidance to the field. But as we can see from the declarations and from the face of the documents, the field there is federal prosecutors and not law enforcement agents within the FBI.

Finally, with respect to the redactions made pursuant to 7(E), the ACLU says that it is hard to believe that there would be nonpublic information on every page of the document. But it is not unreasonable to think that there is information that is not public that is unable to be reasonably segregated from the documents. As the declarations describe throughout the documents, there is factual information about the types of law enforcement techniques that the department is employing interwoven with the legal analysis of what this means in light of the Jones decision. So the redactions that were made were appropriate, and that can be decided based on the declarations that were put in by the government.

THE COURT: Thank you, Ms. Schoenberger.

Counsel, first I want to thank you for your thoughtful arguments and your well-written briefs. They have persuaded me of one thing at this moment, and that is that I should exercise my discretion to review these two memoranda ex parte. In order to decide this question, I am going to direct the government to provide the two memoranda to the Court for an ex parte in camera review. I would presume that you could get those materials to me on Monday of next week.

MS. SCHOENBERGER: Certainly, your Honor.

THE COURT: Very well. Anything further? Thank you. Have a good afternoon.

(Adjourned)